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No. 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners submit this reply brief in order to correct certain misapprehensions created by respondent's brief.[1]

Since respondent makes only a *pro forma* attack on petitioners' claim of absolute immunity as Presidential advisers (Resp. at 22-24) and raises no issue on this point requiring rebuttal,[2] petitioners rest their claim for absolute immunity upon the arguments advanced in their petition and devote this reply brief to respondent's main contention, namely, that this Court need not review this case to determine whether summary judgment on the ground of qualified immunity was appropriately denied.

PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY, AND THIS COURT SHOULD REVIEW THIS CASE TO ENSURE THAT THE LOWER COURTS DO NOT EVISCERATE THE DEFENSE BY DENYING MOTIONS FOR SUMMARY JUDGMENT WHEN IT IS APPROPRIATELY ASSERTED.

Respondent contends that this is not an appropriate case for this Court to clarify when summary judgment should be

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[1] Since the filing date of respondent's brief, the district court overturned as arbitrary and capricious a ruling by a Civil Service Commission appeals officer that held that Mr. Fitzgerald's reinstated position in the Air Force was equivalent to his former position. *Fitzgerald v. Hampton*, Civ. No. 76-1486 (D.D.C. Mar. 3, 1981). *See* Pet. at 4n.4. The district court ordered the Air Force to place Mr. Fitzgerald in a new position having a rank and qualification requirement similar to his prior position, but that order does not in any way render moot the petition in the instant case.

[2] Respondent concedes that "the immunity defenses asserted by petitioners here are substantially the same as those asserted by defendants in *Halperin v. Kissinger*." Resp. at 2. *See Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), *cert. granted*, 446 U.S. 951 (1980) (No. 80-880). Accordingly, if this Court decides in Halperin that senior Presidential advisers are entitled to absolute immunity, then petitioners here should be held to be absolutely immune, as the record establishes beyond question they were acting "within the outer perimeter of [their] line of duty." *Barr v. Matteo*, 360 U.S. 564 (1959). If the Court so decides, then it would not be necessary to reach petitioners' alternate defense of qualified immunity, which was also asserted by the *Halperin* defendants. Actually, the instant case affords a better vehicle than *Halperin* (which involves questions of the legality of wiretapping) for the consideration of both absolute and qualified immunity defenses: This case — a suit involving an adverse personnel decision by a federal executive department — is the very type of case against which the immunity defenses were established to protect government officials.

granted upon the defense of qualified immunity, because in his view he has adduced enough evidence to withstand a summary judgment motion under not only the traditional test but also the more stringent test applicable when qualified immunity is asserted as a defense.[3]

But in actuality, petitioners have satisfied both the traditional test as well as the more stringent test for determining whether they are entitled to summary judgment on the ground of qualified immunity. This Court can find that neither test was met only if it blindly accepts respondent's interpretation of the facts, and respondent's interpretation is utterly fanciful. For the simple fact of the matter is that after seven years of costly litigation, including exhaustive discovery, respondent has not been able to uncover one shred of direct evidence that petitioners played any part in the elimination of his job. The "very substantial body of evidence" upon which respondent relies (Resp. at 4) is in reality wholly indirect and circumstantial, based entirely on inference and innuendo.

Respondent's brief is a remarkable pastiche of the thousands of pages of depositions in this protracted case, replete with references to a bewildering array of White House and Pentagon officials. However, respondent's extensive speculation on what these officials might have been discussing or doing with respect to respondent Fitzgerald beclouds the issue — which is not whether the White House or the Air Force conspired to abolish Mr. Fitzgerald's position, but whether the individual defendants Bryce Harlow and Alexander Butterfield can be liable to respondent for their wholly peripheral "involvement" in the matter.

While petitioners recognize that in the current posture of this case, it is not appropriate for them to engage in a point-by-point rebuttal of the outright speculation and tendentious presentation of the facts in respondent's brief, some review of

[3] The more stringent test is set forth in *Butz v. Economou*, 438 U.S. 478, 507-08 (1978), and in *Halperin v. Kissinger*, 606 F.2d 1192, 1214-15 (D.C. Cir. 1979), *cert. granted*, 446 U.S. 951 (1980) (Gesell, J., concurring), and is discussed in petitioners' petition to this court for a writ of certiorari filed on December 11, 1980.

the facts is necessary because the essence of petitioners' argument is that petitioners ought not as a matter of law be forced to undergo trial where the facts on the record are insufficient to overcome their qualified immunity defense. Respondent ignores this legal issue and instead advances a specious factual argument, but as petitioners point out below, the record is clear that there is no evidence showing that they played any role in the abolition of respondent's Air Force position. Actually, respondent himself recognizes this, for he does not advert in his brief to the existence of any such evidence. Instead, respondent is reduced to admitting, in order to establish each key factual element of his allegations linking petitioners to the alleged wrongdoing, that "a jury could reasonably infer" the truth of his allegations. *E.g.*, Resp. at 7.

Respondent excuses his weak case by asserting that in conspiracy suits, "plaintiffs necessarily prove their case through 'documents [and] circumstantial evidence and inference.'" Resp. at 4-5 (citing *Blankenship v. Boyle*, 329 F. Supp. 1089, 1099 (D.D.C. 1971)). Admittedly, the federal courts have recognized that "[c]onspiracy . . . may be proved by circumstantial evidence, . . . but [it] may not be proved by innuendo and unsupported inferences." *General Tire & Rubber Co. v. Firestone Tire & Rubber Co.*, 349 F. Supp. 333, 338 (N.D. Ohio 1972). There, in words equally applicable to this case, the district court noted:

> [Plaintiff] wants this Court to take the fact of meetings and communications and some rather random words, and import all manner of malicious intentions. Weighing this evidence, the Court can take only reasonable inferences; it cannot be asked to work itself into fancy plottings. . . . The Court cannot infer malice and dishonor from a set of facts when those some facts are just as susceptible to an interpretation of innocent and proper behavior. [*Id.* at 338-39.]

1. Absence of Any Evidence against Harlow.

The basis for respondent's startling leap of inference that Mr. Harlow was responsible for "advice and approval of the termination plan" (Resp. at 7) consists solely of the fact that Air Force Secretary Seamans had three phone conversations

and one chance meeting with Mr. Harlow about the Fitzgerald matter. The first conversation occurred a few months into the Nixon administration, when Dr. Seamans, who had inherited the Fitzgerald personnel problem from the prior administration, sought an assessment from Mr. Harlow, as the President's aide for Congressional liaison, of possible Congressional reaction to a proposed elimination of Mr. Fitzgerald's position.[4] Dr. Seamans testified that "we [the Air Force Department] didn't ask [Harlow] to pass judgment on the action itself. We just asked him what the impact would be in the relationship with the Congress." Seamans Dep. 2-134. Mr. Harlow's aide called Mr. Seamans back to say that "this was a very sensitive item on the Hill and that it would be their recommendation that we not proceed to make such a change at that time." Seamans Dep. at 2-117. Dr. Seamans' testimony made clear that the decision to adopt the reorganization plan entailing the elimination of respondent's job was made exclusively by the Air Force, without White House involvement. Seamans Dep. at 2-124. Dr. Seamans' testimony on all of these points is uncontradicted.

A few days after Dr. Seamans' telephone call, he met Mr. Harlow "by happenstance" (Seamans Dep. at 2-142; *see* Harlow Dep. at 57-60) at a White House breakfast for Congressmen and gave him an "update" on the Fitzgerald matter; Dr. Seamans testified that Mr. Harlow didn't give "any advice or counsel." Seamans Dep. at 2-142.

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[4] Respondent makes much of the fact that Dr. Seamans' call to Mr. Harlow was out of the ordinary, as it was contrary to "Secretary [of Defense] Laird's standing rule against such communications" with the White House. Resp. at 7. However, it was certainly appropriate for Dr. Seamans to contact Mr. Harlow, the President's top aide for Congressional matters, regarding the proposed Air Force reorganization and its effect upon Mr. Fitzgerald, who had attracted the attention of several Congressmen. Moreover, rather than violating Secretary Laird's rule, the call to Mr. Harlow was made at the express request of the Secretary, as Dr. Seamans has testified that "contact with the White House... [was] normally handled out of Mr. Laird's office, but he felt that I was in a better position to discuss all the aspects of the reorganization with Mr. Harlow; and so he asked me to make the call." Seamans Dep. at 2-115. Besides, even if the contacts were out of the ordinary, why that fact should tend to inculpate Mr. Harlow, who (as respondent concedes) never initiated any communication with Dr. Seamans, is at best puzzling.

Again, Dr. Seamans' testimony on this point is uncontradicted, although respondent's brief might give the casual reader the impression that Dr. Seamans' testimony had been challenged by some credible evidence. Respondent's brief, in its discussion of the White House breakfast, quotes the following statement from an exhibit, without any explanation: "Seamans told him [Harlow] he was going to do it [*i.e.*, terminate Fitzgerald's employment] and wanted counsel as to timing and how to proceed." Resp. at 8. The reason respondent neglects to mention the basis of the statement is that it has been thoroughly discredited by its author, David Wilson, who joined the White House counsel's staff in 1971 (Wilson Dep. at 9), after respondent's position had been abolished. *See* App. A. The statement appears on a piece of notepaper (PX 26A) containing Mr. Wilson's handwritten notes to himself made around the time he was looking into the propriety of Dr. Seamans' assertion of executive privilege at the Civil Service Commission hearings in 1973 (three years after the Seamans-Harlow contacts). Wilson Dep. at 26. Indeed, it is ludicrous that respondent relies on the quoted statement, since its probative value is zero. In view of the totally unreliable nature of Mr. Wilson's notes to himself and the complete uncertainty as to their meaning, why then would respondent present this as "evidence" of a critical element of his allegation, namely, whether Mr. Harlow advised the Air Force on its decision to abolish respondent's position? The answer is simply that it is the only statement that respondent could find to support his case. Even so, there is still no evidence to contradict Dr. Seamans' and Mr. Harlow's testimony that no advice was given.

Finally, respondent also points to the fact that Dr. Seamans made two other calls to Mr. Harlow, but again the record is bereft of any intimation that Mr. Harlow in any way ordered, approved or even advised on the abolition of Mr. Fitzgerald's job. One call was made on November 4, 1969 (a half a year after the last contact with Mr. Harlow on the matter), the day *after* Dr. Seamans signed the reorganization plan affecting Mr. Fitzgerald, to inform Mr. Harlow of the action; and the other call was made a month later to inform Mr. Harlow that the Air Force was concerned about any White House reversal of the Department's decision. How respondent can rely on the fact of

phone calls made by Dr. Seamans after his decision to eliminate respondent's job as incriminating Mr. Harlow is mystifying.

From these three phone calls and one "happenstance" meeting — all without any suggestion on the record that Mr. Harlow played a part in the Air Force's decision to terminate Mr. Fitzgerald's position — respondent has concocted his case against Mr. Harlow. Indeed, all the evidence points the other way: As respondent admits (Resp. at 8), Mr. Harlow expressly told Dr. Seamans that the abolition of Fitzgerald's position would cause problems with Congressional relations and ought not be done (Seamans Dep. at 2-117); and this is certainly consistent with Mr. Harlow's natural desire not to make his job — Congressional relations — even more difficult. This fact was further supported by Press Secretary Ronald Ziegler, whom respondent is quite willing to quote as telling President Nixon that "when we came in it [the Fitzgerald matter] was all Harlow's ball game." Resp. at 11. But respondent neglects to quote Mr. Zielger's very next comment, which establishes that Mr. Harlow was *opposed* to the elimination of Mr. Fitzgerald's job: When the President inquired, "Bryce was all for canning him, wasn't he?," Mr. Ziegler replied, "No, I think Bryce may have been the other way." App. B.

The respondent relies heavily on statements made at and immediately after a Presidential press conference held on January 31, 1973 — more than three years after the abolition of respondent's position. In response to a question at the press conference, President Nixon stated that he had "approved" the assertion of executive privilege by Air Force Secretary Seamans at a Civil Service Commission hearing on Fitzgerald's reinstatement. But in a review session with aides in the Oval Office right after the press conference, Mr. Nixon realized that his comment had been in error, as he had been "thinking of another case." The President told John Ehrlichman, "I'm thinking of another guy actually... I had two names in my mind.... I really didn't know the question. But I had to back up the son of a bitch Seamans." Transcript of Presidential conversation with John Ehrlichman on January 31, 1973 at 4:32 p.m.[5]

[5] The transcripts of Presidential conversations relevant to this case appear as Appendix C to the petition for a writ of *certiorari* filed in this case by Mr. Nixon on May 14, 1980 (No. 79-1738).

In a sentence typical of respondent's propensity for unsupported statements and quotations taken out of context, respondent's brief states "[t]he record shows that the person Seamans had been talking to [*i.e.*, the person who had discussed the Fitzgerald matter with the President] was Harlow, who 'was all for canning him.'" Resp. at 11. However, there is no evidence to support such a conclusion. Indeed, the sworn testimony is to the contrary. Moreover, the quotation is misleading. The transcript of the White House tapes, both of the review session following the press conference and a subsequent discussion with Press Secretary Ziegler, indicate that President had only a dim memory, if any, of the Fitzgerald matter, which had occurred three years before. As is apparent from the transcript quoted in Appendix B hereto, the President's obvious confusion and poor recollection demonstrated immediately after the press conference, renders meaningless his statement at the press conference (which, in any case, does not implicate Mr. Harlow). Any inference respondent seeks to make from such statement is simply conjecture.

2. Absence of Any Evidence against Butterfield.

In the case of Mr. Butterfield, the evidence is equally sparse. Respondent bases his whole case against Mr. Butterfield on a single telephone conversation and a single memorandum in which Mr. Butterfield urged that the administration let respondent "bleed."[6] But after more than seven

[6] Respondent attempts to show that Mr. Butterfield's expression of personal opinion was outside the outer perimeter of his authority as a Presidential aide, and respondent cites the testimony of H.R. Haldeman (Mr. Butterfield's immediate superior) and Press Secretary Ziegler to the effect that Mr. Butterfield generally would not "have prepared substantive matters for a press conference." Resp. at 13, 20. But petitioner Butterfield has never asserted that his expression of opinion to Mr. Haldeman regarding the Fitzgerald matter was intended as the substantive position to be expressed at a Presidential press conference. The tone of Mr. Butterfield's memorandum makes it evident that it was not intended as the basis for a Presidential answer, and moreover the memorandum was not sent to the White House official responsible for preparing such answers. As noted in the petition (Pet. at 4), the memorandum was written to Mr. Butterfield's immediate superior (stemming from a White House Press Office inquiry) merely to ascertain whether the administration had a position on the Fitzgerald matter. The memorandum contained his personal opinion on the Fitzgerald matter, and

(*footnote continues*)

years, respondent has not been able to show that Mr. Butterfield's admittedly pungent language had any causal impact whatsoever on the Air Force's decision to eliminate respondent's job. Indeed, he cannot make such a showing, since it is undisputed that Mr. Butterfield made the telephone call and wrote the memorandum *after* the Air Force publicly announced the adoption of the reorganization plan eliminating respondent's job. The phone call was made by Mr. Butterfield to Mr. Haldeman's San Clemente office in response to a request that Mr. Butterfield look into Mr. Fitzgerald's job status, since Mr. Haldeman had been asked by the President to see if another position could be found for Mr. Fitzgerald in the federal government. DX 163; DX 165; DX 169; DX 170. The substance of the phone call was not communicated to the Air Force or Defense Departments, and no action was taken on the basis of it. Similarly, Mr. Butterfield's memorandum was not distributed to or seen by Dr. Seamans or other Pentagon officials. Seamans Dep. 3-240. As respondent concedes, in quoting *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), in order for his claim against Mr. Butterfield to succeed, he must establish an "affirmative link" between Mr. Butterfield's phone call or memorandum and the allegedly wrongful termination of respondent's employment. There is no such "affirmative link," and respondent has not even hinted at one.

3. The Appropriateness of Summary Judgment.

In sum, it is hard to conceive of a case having any weaker factual foundation. Respondent bases his claims on layer upon layer of inference and innuendo, on pure conjecture and speculation about what might have happened. Since there is no evidence establishing that either Mr. Harlow or Mr. Butterfield played any role in the decision to abolish Mr. Fitzgerald's position, respondent's case is premised on the erroneous assumption that it is conceivable that a rational jury in this case could *infer*, from the juxtaposition of the dates of various phone calls, meetings and memoranda, that Mr. Harlow and Mr.

(*footnote continued*)

this was entirely proper since President Nixon had expressly given staff members such as Mr. Butterfield the authority "to express views on subjects which were not in their specific limited responsibilities." Nixon Dep. at 366-67.

Butterfield did play such a role. From Dr. Seamans' phone call on May 9, 1969 to check out Congressional attitudes, respondent would ask a jury to infer, without any evidence, that Mr. Harlow approved of and gave advice on the decision made six months later to abolish respondent's position. And from Mr. Butterfield's phone call and memorandum written after that decision, respondent would ask a jury to infer, again without evidence, that Mr. Butterfield was responsible for respondent's loss of employment. Surely a jury finding of culpability here, in the face of sworn testimony uncontradicted by any credible evidence on each material point, would be impermissible.

It is precisely this kind of patently "insubstantial lawsuit" that this Court said should be "quickly terminated" on a summary judgment motion when the defense of qualified immunity is raised. *Butz v. Economou*, 438 U.S. 478, 507 (1978). If summary judgment is denied and petitioners are forced to go to trial on as meager a record as this one, the protection that the qualified immunity defense is supposed to offer will be all but eviscerated.

Messrs. Harlow and Butterfield were called upon daily to give their opinion and advice on questions that might affect the interests of all kinds of individuals and groups. Mr. Fitzgerald's job problem was merely one of many such matters. If respondent can force this lawsuit to trial, then so too can almost any of the hundreds of other individuals or groups aggrieved by government decisions in which Presidential assistants like Messrs. Harlow and Butterfield might have had some tangential role. They could all construct the same elaborate theories upon the same layers of inference and innuendo, upon the same conjecture and speculation, asking a court "to work itself into fancy plottings." *General Tire & Rubber Co. v. Firestone Tire & Rubber Co., supra*, 349 F. Supp. at 338.

No senior Presidential adviser would be immune from suit, because an enterprising plaintiff would always be able to find some meeting or telephone call or memorandum like those found by Mr. Fitzgerald in which the plaintiff's matter was discussed. And taking that as a foundation, some theory of causality and liability could be fabricated. Factual inferences constructed from the slightest bits and pieces of evidence plus allegations of malice and civil conspiracy should not be a

simple formula for defeating a motion for summary judgment on the ground of qualified immunity. For if it is, senior advisers in every administration will never be able to escape the inevitable risks and burdens of trial, and they will always live and govern in fear of financial ruin. The debilitating impact such a result would have on the administration of government is obvious.

Thus, the very facts of this case give this Court an eminently appropriate opportunity to clarify and reemphasize what it meant when it admonished the lower federal courts to "weed out insubstantial claims" when the defense of qualified immunity is raised. *Butz v. Economou, supra,* 438 U.S. at 527. If this case can escape summary judgment, so too can almost every other lawsuit against a federal official claiming qualified immunity. In order not to undermine the protection that the qualified immunity doctrine was fashioned to afford, this Court should grant certiorari and review this case to ensure that the lower courts properly employ summary procedures when the qualified immunity defense is raised.

CONCLUSION

Petitioners respectfully assert that the Court should allow the writ of *certiorari* here.

Respectfully submitted,

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APPENDIX

APPENDIX A

Testimony of David Wilson regarding statement quoted in respondent's brief (see Resp. at 8):

> Q. Directing your attention once again to Plaintiff's Exhibit 26A near the bottom of the page under the world — word "Harlow," I refer you to the notation "May 15 — Seamans told him that he was going to do it." I ask you does that refresh your recollection concerning the conversation you had with Mr. Harlow?
>
> A. [Mr. Wilson:] My recollection as to specific dates is, is a not good. Generally, my guess is I had thought that Seamans had informed Harlow as to the dismissal of Fitzgerald. Obviously, that occurred in November, however, and not in May, so that—that could not relate to that, but I—
>
> Q. Then what could it relate to?
>
> . . .
>
> A. I don't know.
>
> Q. Referring your attention once again to Plaintiff's Exhibit 26A, the bottom of the page "May 15—Seamans told him . . . " Who is "him"?
>
> A. I think that must refer to Harlow. I think that notation must have been made after my conversation with Mr. Harlow.
>
> Q. I take it then that it is your best recollection that the reference in Plaintiff's Exhibit 26A for identification to the reference "Seamans told him that he was going to do it." that "it" does not refer to Fitzgerald's dismissal? Is that your recollection?
>
> A. It must refer to some proceeding in the Fitzgerald case. I do not know whether it was dismissal or whether it was in connection with uh, a congressional hearing on the matter or what.

Wilson Dep. at 34-35.

APPENDIX B

Text of the relevant portion of the transcript of the Nixon-Ziegler conversation, in which it appears that the President was thinking that he had at the press conference confused Mr. Fitzgerald with Gordon Rule (another Pentagon civil servant):

Ziegler: You see, this [*i.e.*, the Fitzgerald matter] is a case of, that, that, uh—

President: Came before we—.

Z: —came before we came in—

P: Oh, yeah.

Z: —but when we came in it was all Harlow's ball game [unintelligible]. I had a call in to Bryce on it.

P: Bryce was all for canning him, wasn't he?

Z: *No, I think Bryce may have been the other way.* That's why I [unintelligible]—.

P: Oh.

Z: See, at one point in '69—

P: Oh.

Z: —there was some discussion about hiring Fitzgerald over here at OMB—

P: Oh.

Z: —because it was felt that he did get a bum rap over there.

P: Oh, see?

Z: But I—.

P: You see, the case I was thinking about, when you asked me, was the other case—

Z: Rule.

P: —the Rule case, that's right. I thought [unintelligible]—.

Z: Which we can't say, of course.

P: I can't go [unintelligible].

Transcript of Presidential conversation with Ronald Ziegler on Feb. 26, 1973, at 4:50 p m. (emphasis added).